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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 IN RE PORTFOLIO RECOVERY
12 ASSOCIATES, LLC, TELEPHONE
13 CONSUMER PROTECTION ACT
14 LITIGATION

Case No.: 11md02295 JAH - BGS

Member cases:
All member cases

15 **ORDER DENYING APPLICATION**
16 **TO CONDUCT DISCOVERY**
17 **[Doc. No. 813]**

18 **INTRODUCTION**

19 On May 27, 2021, this Court granted Plaintiffs' motion seeking to reopen discovery
20 for the limited purpose of conducting discovery from a representative of Avaya and
21 showing that the Avaya Predictive Dialer used by Defendant meets the requirements of an
22 automatic telephone dialing system ("ATDS") as explained in *Facebook, Inc. v. Duguid*,
23 141 S.Ct. 1163 (2021). The Court granted the motion and directed Plaintiffs to complete
24 the limited discovery on or before July 26, 2021.¹ Following the Court's order, Plaintiffs
25 sent written discovery to Defendant and Avaya Technologies. In response, Defendant filed
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28 ¹Plaintiffs indicated the discovery they sought in this matter was the same discovery the district court
granted in *Bell v. Portfolio Recovery Services, LLC*, a related action in the Western District of Texas.

1 a motion to quash which was set for hearing before the Honorable Bernard G. Skomal,
2 United States Magistrate Judge. Shortly, thereafter, Plaintiffs filed a motion to conduct
3 discovery before this Court in which they sought an order permitting discovery from
4 Defendant and maintains the Avaya software is connected to Defendant's PRANet
5 database. Finding the issues overlapped with those pending before Judge Skomal, this
6 Court denied the motion without prejudice to filing the motion after Judge Skomal's ruling
7 on the motion to quash. On July 23, 2021, Judge Skomal denied the motion to quash.²

8 On July 26, 2021, Plaintiffs filed a renewed motion to conduct discovery, seeking
9 an order permitting discovery from Defendant and 120 days to complete all discovery.
10 Defendant filed an opposition to the motion on August 11, 2021, and Plaintiffs filed a reply
11 on August 17, 2021. Defendant filed a notice of supplemental authority in support of its
12 opposition and Plaintiffs filed a response. Defendant filed additional notices of
13 supplemental authority thereafter.

14 DISCUSSION

15 In the pending motion, Plaintiffs seek an order allowing additional discovery of
16 Defendant's source code, allowing them to depose Defendant's representative after it
17 responds to the written discovery request, allowing the parties to retain additional experts
18 if necessary, allowing 120 days to complete discovery, and continued abatement of the
19 motions for summary judgment. They argue good cause exists to permit discovery from
20 Defendant because they believe Defendant's PRANet, the Avaya software/dialer and the
21 Asimut Technologies software combine to make an ATDS as defined by the Supreme
22 Court in *Facebook* and a consultant hired by Plaintiffs explained how the system used by
23 Defendant could use a random or sequential generator. Plaintiffs' consultant attests it is
24 necessary to review Defendant's source code to conduct a complete analysis of the dialing
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27 ² Third party Avaya filed a motion to quash which is currently pending before Judge Skomal. The
28 subpoena at issue in the motion before Judge Skomal does not involve the discovery Plaintiffs seek in
the instant motion.

1 system and determine whether it is an ATDS as explained by the Supreme Court in footnote
2 7 of the *Facebook* decision. Hollaar Decl. ¶¶ 5, 6, 11 (Doc. No. 813-3).

3 Defendant argues Plaintiffs are not entitled to an extension because they failed to
4 diligently pursue discovery and the request for additional discovery is not authorized.
5 Defendant also argues the request is futile because Plaintiffs' theory that footnote 7 in
6 *Facebook* created liability when any random or sequential number generator is used, even
7 though the statute was only intended to target random and sequential telephone numbers,
8 has been considered and rejected by multiple district courts.

9 In reply, Plaintiffs contend the Supreme Court made it clear, in *Facebook*, if a dialing
10 system uses a random or sequential number generator to store or produce telephone
11 numbers, it is an ATDS under the TCPA. According to Plaintiffs, Defendant's system is
12 an ATDS if it uses a random or sequential number generator to either store the numbers or
13 store the numbers in a list and call them. Plaintiffs further maintain they have been diligent
14 in seeking discovery.

15 **I. Futility**

16 Plaintiffs' application to reopen discovery and the instant application to conduct
17 discovery are based on their interpretation of footnote 7 of the *Facebook* decision. They
18 maintain the Supreme Court explained that a device would qualify as an autodialer if it
19 used a random number generator to determine the order in which to pick phone numbers
20 from a preproduced list and stored the numbers to be dialed at a later time. Defendant
21 maintains courts have rejected this theory, including, *Barry v. Ally Fin., Inc.*, 2021 WL
22 2936636 (E.D.Mich. July 13, 2021), *Hufnus v. DoNotPay, Inc.*, 2021 WL 2585488
23 (N.D.Cal. June 24, 2021), *Timms v. USAA Fed. Sav. Bank*, 2021 WL 2354931 (D.S.C. June
24 9, 2021), *Borden v. eFinancial, LLC*, 2021 WL 3602479 (W.D.Wash. August 13, 2021),
25 *Wilson v. Rater8, LLC*, 2021 WL 4865930 (S.D.Cal. Oct. 18, 2021) and *Gross v. GG*
26 *Homes, Inc.*, 2021 WL 4804464 (S.D.Cal. Oct. 14, 2021). Defendant argues the district
27 courts in *Barry*, *Hufnus*, *Timms*, *Borden*, *Wilson* and *Gross* rejected Plaintiffs' theory by
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1 determining randomly or sequentially generated numbers are required for liability under
2 the act.

3 Plaintiffs suggest the cases cited by Defendant are distinguishable because they
4 address how numbers are generated not how the numbers are stored. Plaintiffs maintain
5 their requested discovery will uncover whether Defendant's calling system stores
6 telephone numbers using a random or sequential generator and, as such, the discovery
7 should be allowed.

8 Contrary to Plaintiff's suggestion, the cases cited by Defendant address more than
9 how the numbers are generated. In *Barry*, the court rejected the plaintiff's argument that
10 the defendant's system qualified as an ATDS if the defendant used a random number
11 generator to determine the order in which it called the plaintiff's number. 2021 WL
12 2936636, * 6. The court noted the plaintiff relied on footnote 7 in suggesting the Supreme
13 Court in *Facebook* raised the possibility that a system will qualify as an ATDS if it uses a
14 random number generator to determine the order in which to pick phone numbers from a
15 preproduced list. *Id.* Finding the Supreme Court addressed and rejected the plaintiff's
16 argument in *Facebook* that the phrase "using a random or sequential number generator"
17 modifies only "produce," and not "store" and explained, in the footnote, how an autodialer
18 might both "produce" randomly or sequentially generated phone numbers and store them
19 to be called later, the *Barry* court determined the stored "preproduced list" of phone
20 numbers referenced in the footnote was itself created through a random or sequential
21 number generator. *Id.*

22 The plaintiff in *Hufnus* alleged the defendant used a random and/or sequential
23 generator to pull from a list of stored numbers to send targeted text messages and used a
24 random and/or sequential generator to determine the sequence in which to send messages.
25 2021 WL 2585488, *1. Noting the system contacted phone numbers specifically provided
26 by consumers during a registration process and not phone numbers identified in a random
27 or sequential fashion, the court determined the platform did not qualify as an autodialer
28 under the TCPA. 2021 WL 2585488, *2. Relying on footnote 7, the plaintiff argued the

1 defendant's platform qualified as an ATDS because it used a random number generator to
2 determine the order in which to pick from the stored preproduced list of consumer phone
3 numbers. The *Hufnuss* court found the "preproduced list" of phone numbers referenced in
4 the footnote was itself created through a random or sequential number generator. 2021 WL
5 2585488, *1. The court also found the plaintiff's reading of footnote 7 conflicts with the
6 Supreme Court's holding and rationale in *Facebook* which explained the TCPA's
7 definition of an autodialer concerns devices that allow companies to dial random or
8 sequential blocks of telephone numbers automatically, not systems that randomly or
9 sequentially dial numbers from a preproduced list that was created in a non-random, non-
10 sequential way. *Id.*

11 The court in *Timms* rejected the plaintiff's similar argument that footnote 7 left open
12 the possibility that a system that uses a random number generator to determine the order in
13 which numbers are dialed from a stored list may qualify as an ATDS. 2021 WL 2354931,
14 *5 - *7. The court specifically noted that footnote 7 follows the reference to 1988
15 equipment which used a number generator to store numbers to be called later and reasoned
16 that the preproduced list referenced in footnote 7 is sequentially generated and stored. 2021
17 WL 2354931, *7.

18 The court in *Borden* also determined the preproduced list discussed in footnote 7
19 was created through the use of a random or sequential number generator. 2021 WL
20 3602479, *5. The court found the plaintiff relied on a selective reading of one line within
21 footnote 7 that ignored the greater context of the footnote and opinion to support his
22 argument that a system that uses a random number generator to determine the order in
23 which to pick numbers from a preproduced list and then store them to be dialed at another
24 time. *Id.* The cases from this district also recognize the use of an ATDS to support a claim
25 under the TCPA require the numbers dialed be produced using a random or sequential
26 number generator. *See Gross*, 2021 WL 4804464; *Wilson*, 2021 WL 4865930.

27 The cases cited by Defendant clearly discuss how the numbers dialed were generated
28 as part of the larger discussion surrounding the plaintiffs' argument that a defendant's

1 system qualifies as an ATDS if it uses a random or sequential number generator to store
 2 numbers from a preproduced list to be called at a later time or to determine what order to
 3 call numbers from a preproduced list. Here, Plaintiffs make the same argument in seeking
 4 leave to conduct discovery. They suggest the use of a random or sequential number
 5 generator to store numbers that were not produced using a random or sequential number
 6 generator is sufficient to support a claim under the TCPA. Plaintiffs cite no cases
 7 supporting their theory and this Court’s own research found none.

8 The Court finds the decisions in the district court cases discussed above persuasive.
 9 As noted by those courts, the context of the footnote on which Plaintiffs rely involves the
 10 Supreme Court’s discussion of how technology may both produce and store randomly
 11 generated numbers in response to the plaintiffs’ superfluity argument.³ *Facebook*, 141
 12 S.Ct. at 1172. The discussion includes an example of 1988 technology provided by an
 13 *amici curiae* brief filed by the Professional Association for Customer Engagement that
 14 stored numbers to be dialed later. *Id.* The reference to the brief demonstrates the
 15 “preproduced list” mentioned in the footnote is generated through the use of a random or
 16 sequential number generator. *Borden*, 2021 WL 3602479, *5; *Barry*, 2021 WL 2936636
 17 *6; *Hufnus*, 2021 WL 2585488, *1; *Timms*, 2021 WL 2354931, *7.

18 The context of the opinion in *Facebook* also fails to support Plaintiffs’ theory. In
 19 determining that the definition of an ATDS requires “a device [] have the capacity either
 20 to store a telephone number using a random or sequential generator or to produce a
 21 telephone number using a random or sequential number generator,” the Supreme Court
 22 found the prohibitions of the act “target[ed] a unique type of telemarketing equipment that
 23 risks dialing emergency lines randomly or tying up all the sequentially numbered lines at
 24 a single entity.” *Facebook*, 141 S.Ct. at 1171. The definition of an autodialer does not
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 28 ³ The plaintiff in *Facebook* argued it made the most “sense” that the language “using a random or
 sequential number generator” only modified “produce” and not “store.”

1 concern systems that randomly or sequentially store and dial numbers from a list that is
2 generated in a non-random and non-sequential way.

3 Plaintiffs do not allege their numbers were generated from a list that was produced
4 in a random or sequential way as they allege Plaintiffs are consumers from which
5 Defendant attempted to collect debts through repeated phone calls and Defendant obtained
6 Plaintiffs' numbers through the use of skip-tracing services. Amended Complaint ¶¶ 25,
7 37. The request to conduct discovery to support a rejected theory is futile. Accordingly,
8 Plaintiffs fail to demonstrate good cause to support their application.

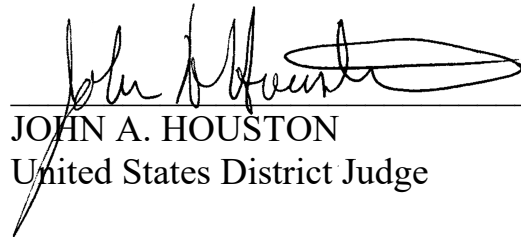
9 **II. Remaining Arguments**

10 Because the Court finds Plaintiffs' request to conduct additional discovery is futile,
11 it will not address the remaining arguments.

12 **CONCLUSION AND ORDER**

13 Based on the foregoing, IT IS HEREBY ORDERED Plaintiffs' application to
14 conduct discovery is **DENIED**.

15 DATED: November 9, 2021

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18 JOHN A. HOUSTON
19 United States District Judge
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